

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

Gaynor

File: A29 719 270 - Buffalo

Date:

MAR 22 1996

In re: NOEL MARY GAYNOR
IN DEPORTATION PROCEEDINGS
APPEAL

INDEX

ON BEHALF OF RESPONDENT: Mark T. Kenmore, Esquire
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Buffalo, New York 14202

CHARGE:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] -
Excludable at entry under section
212(a)(2)(A)(i)(I), I&N Act [8 U.S.C.
§ 1182(a)(2)(A)(i)(I)] - Crime involving moral
turpitude

APPLICATION: Remand

In a decision dated March 18, 1994, an Immigration Judge found the respondent deportable on the charge set forth above and denied his applications for asylum, withholding of deportation, and adjustment of status. The respondent's appeal from that decision is pending before this Board. On February 21, 1995, the respondent filed a motion to remand, 1/ asserting that the Immigration Judge improperly found his 1977 conviction for murder in Northern Ireland an aggravated felony, rendering him statutorily ineligible for asylum. The certificate of service enclosed with the respondent's motion to remand states that the Immigration and Naturalization Service was sent a copy of the motion on February 16, 1995; however, the Service has not filed a response to the respondent's motion.

Section 208(d) of the Immigration and Nationality Act, 8 U.S.C. § 1158(d), provides that an alien who has been convicted of an aggravated felony may not apply for or be granted asylum. Section 243(h)(2) of the Act, 8 U.S.C. § 1253, provides that withholding of deportation is unavailable to an alien who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.

1/ The respondent's motion is entitled "Supplemental Motion to Remand," in that his appeal also requests remand on various issues.

Section 243(h)(2) of the Act further provides that an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

The term "aggravated felony" was introduced into the Act by section 7342 of the Anti-Drug Abuse Act of 1988, 102 Stat. at 4469-70. As enacted, section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43)(1988), provided, "The term 'aggravated felony' means murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States." (Emphasis added.) Thus, crimes committed outside of the United States were not originally considered aggravated felonies under the Act.

Section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43) currently defines the term "aggravated felony" as including, among other crimes, murder. Section 101(a)(43) of the Act was amended by § 222(a) of the Immigration and Nationality Technical Corrections Act of 1994 (P.L. 103-416, 108 Stat. 4320, Oct. 25, 1994), applicable to convictions entered on or after October 25, 1994. For convictions before that date, and requisite to our analysis, the definition provided as follows:

The term "aggravated felony" means murder, any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, any offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments), or any crime of violence (as defined in section 16 of title 18, United States Code, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least 5 years, or any attempt or conspiracy to commit any such act. Such term applies to offenses described in the previous sentence whether in violation of Federal or State law and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years. (Emphasis added.) See section 501(a) of the Immigration Act of 1990 (effective Nov. 29, 1990).

For purposes of the mandatory bar to asylum, under the Immigration Act of 1990 and the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, an alien convicted of an aggravated felony is ineligible to apply for or be granted asylum whether the conviction occurred before, on, or after, the enactment date of the Immigration Act of 1990, November 29, 1990, with the exception of the crimes added to the aggravated felony definition by the Immigration Act of 1990, which are considered aggravated felonies only if committed on or after November 29, 1990. Matter of A-A-, 20 I&N Dec. 492 (BIA 1992). The crimes added to the aggravated felony definition by the Immigration Act of 1990 are money laundering, nonpolitical crimes of violence, and foreign law violations. See section 501(a) of the Immigration Act of 1990, 104 Stat. at 5048. The Immigration Act of 1990 specified that these crimes would be considered aggravated felonies if committed on or after the date of its enactment, November 29, 1990. See section 501(b) of the Immigration Act of 1990, 104 Stat. at 5048.

We find that the Immigration Judge erred in pretermittting the respondent's applications for asylum and withholding of deportation based on his 1977 murder conviction in Northern Ireland. The Immigration Judge determined that "except the 2 crimes added to the de[f]inition by the Immigrat[i]on Act of 1990 - money laundering and crimes of violence for which the sentence is at least five years," the aggravated felony definition is retroactive (I.J. at 4). The Immigration Judge erred in not considering the third exception--foreign law violations. The Immigration Judge concluded that "therefore, aliens convicted of murder are ineligible for asylum regardless of when the conviction occurred." (I.J. at 4). Although the Immigration Judge's conclusion regarding retroactivity of the aggravated felony definition is correct concerning murders committed within the United States, it is in error regarding murders committed outside of this country.

As explained above, a foreign conviction for a crime listed in section 101(a)(43) of the Act is considered an "aggravated felony" only if committed on or after November 29, 1990. Matter of A-A-, supra, at 500. Thus, the respondent's 1977 murder conviction in Northern Ireland should not have been considered an aggravated felony to statutorily bar the respondent from relief in the form of asylum and withholding of deportation. Accordingly, we will grant the respondent's motion to remand to provide the respondent the opportunity to present his applications for asylum and withholding of deportation. 2/

2/ In view of our remand to the Immigration Judge, we will not address the issues raised by the respondent on appeal.

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ORDER: The motion to remand is granted and the record is remanded to the Immigration Judge for further proceedings.

FOR THE BOARD